

IT 05-8

Tax Type: Income Tax

Issue: Non-Filers (Income Tax)

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

---

<b>THE DEPARTMENT OF REVENUE</b>	)	Docket No.	04-IT-0000
<b>OF THE STATE OF ILLINOIS</b>	)	Tax ID Nos.	000-00-0000
v.	)		000-00-0000
	)	Tax Year	2001
<b>JOHN &amp; JANE DOE,</b>	)	John E. White	
Taxpayers	)	Administrative Law Judge	

---

**RECOMMENDATION FOR DISPOSITION**

**Appearances:** John Doe appeared *pro se* for taxpayers; Rickey Walton, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

**Synopsis:** This matter involves John & Jane Doe's (the Does or taxpayers) protest of a Notice of Deficiency (NOD) the Illinois Department of Revenue (Department) issued to them regarding tax year ending December 31, 2001. The Department issued the NOD after it determined that taxpayers had not filed an Illinois income tax return for that year, and that they were required to have done so.

The issue at hearing was whether taxpayers filed a return for 2001, and if not, whether the second tier penalty, proposed pursuant to § 3-3 of the Uniform Penalty and Interest Act (UPIA), should be abated for reasonable cause. After considering the evidence offered at hearing, I recommend that the first issue be resolved in the Department's favor, and that the second issue be decided in taxpayers' favor.

**Findings of Fact:**

1. The Does were Illinois residents during 2001. Department Ex. 1 (NOD).
2. Taxpayers resided in Carol Stream during 2001, and used a Carol Stream address when they filed their 2000 Illinois individual income tax return, and when they filed their 2001 federal income tax return, both of which they filed jointly. Taxpayer Exs. 1 (copy of taxpayers' 2001 federal return), 2 (copy of taxpayers' 2000 Illinois return).
3. The Department did not, and as of September 29, 2004, had not received an Illinois individual income tax return from taxpayers regarding tax year 2001. Department Ex. 2 (certificate of Department's Records Manager).
4. The Department issued an NOD to taxpayers on June 23, 2004. Department Ex. 1.
5. The statement portion of the NOD notified taxpayers that, after receiving information from the Internal Revenue Service, the Department had determined that: taxpayers' adjusted gross income (AGI) and their base income for 2001 was \$18,741; taxpayers were entitled to exemptions in the amount of \$8,000; and that taxpayers' net income was \$10,741. Department Ex. 1, p. 3 (Computation of deficiency).
6. Based on those determinations, the NOD notified taxpayers that they had an Illinois income tax liability of \$322. Department Ex. 1, p. 3.
7. The NOD also notified taxpayers that a penalty in the amount of \$513 was being proposed. Department Ex. 1, p. 3. The NOD further notified taxpayers that the penalty was being measured and proposed in two separate tiers, and it explained the separate bases for the different tiers. Department Ex. 1, p. 2 (Reasons for deficiency). Specifically, the NOD provided, in pertinent part:

\*\*\*

We are imposing a late-filing or nonfiling penalty because you did not file a processable return by the due date (including any extended due date). This penalty is figured at the rate of 2 percent of the amount of tax required to be shown due on your return, after subtracting any payments made or credits allowed by the due date of the return. This penalty is imposed the day after the original due date of your return, including any extended due date.

An additional penalty is imposed if you file a return that we cannot process and you do not correct it within 30 days of the date we notify you; or you do not file a return within 30 days of the date we send you a notice of nonfiling. The additional penalty is equal to the greater of \$250 or 2 percent of the amount of tax shown due on your return, determined without regard to any payments made or credits allowed by the due date of your return, and cannot exceed \$5,000. This penalty will be assessed even if there is no tax liability due. (35 ILCS 735/3-3(a-10))

\*\*\*

Department Ex. 1, p. 2.

8. Finally, the NOD notified taxpayers that the penalty and interest proposed in the NOD may be doubled if their proposed tax liability qualified for amnesty, and if taxpayers did not pay that liability during the amnesty period held October 1, 2003 through November 17, 2003. Department Ex. 1, p. 2; *see also* 35 ILCS 745/1–999 (2003) (Tax Delinquency Amnesty Act); P.A. 93-0026.

#### **Conclusions of Law:**

When the Department introduced the NOD it issued to taxpayers into evidence, it presented prima facie proof that the Does were liable for the tax and penalties proposed. 35 ILCS 735/3-3(f); 35 ILCS 5/904(a). The Department's prima facie case is a rebuttable presumption. Branson v. Department of Revenue, 68 Ill. 2d 247, 261, 659 N.E.2d 961, 968 (1995). A taxpayer cannot overcome the presumption merely by denying the accuracy of the Department's assessment, or merely by denying knowledge of a tax deficiency. Branson, 68 Ill. 2d at 267, 659 N.E.2d at 971; A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988). Instead, a taxpayer is obliged to present documentary evidence that is consistent, probable and closely identified with its books and records, to show that the proposed assessment is not correct. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 333, 155 N.E.2d 3, 7 (1958); PPG Industries, Inc. v. Department of Revenue, 328 Ill. App. 3d 16, 33-34, 765 N.E.2d 34, 48-49 (1<sup>st</sup> Dist. 2002).

The first issue is whether taxpayers filed an Illinois return for 2001. The Department offered into evidence the NOD, in which the Department notified taxpayers that it determined that they had not filed a return for 2001. It also offered into evidence, under seal, a letter from the Department's records manager in which she certified that she had "diligently searched the records of this Department" and that "[n]o Illinois Individual

Income Tax Return for 2001 was processed as of September 29, 2004.” Department Ex. 2. (certification of Laura Teer).

Mr. Doe could not dispute that the Department may not have received a return from him and his wife for the applicable year, but he testified that he was sure that he had mailed one to the Department for 2001, because he and his wife had always filed their state tax returns at the same time they filed their federal returns. Upon cross examination, however, Mr. Doe admitted that he did not have any documentary evidence that might corroborate his testimony, such as a registered or certified mail receipt, a cancelled check or money order receipt, or a receipt from a refund check. Since his testimony is not corroborated by any documentary evidence, I conclude that it is not sufficient to rebut the prima facie correctness of the Department’s determinations that taxpayers did not file a return for 2001, and that they were required to have done so. Department Ex. 1; 35 ILCS 5/904; Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296-97, 421 N.E.2d 236, 239 (1<sup>st</sup> Dist. 1981) (uncontroverted testimony that was not corroborated with documentary evidence was insufficient to show that taxpayer was entitled to claimed exemption).

The second issue is whether the late filing and late payment penalties should be abated. Taxpayers are more specifically arguing that, in this case, the statutory requirements were not met for the imposition of the second tier penalty. Section 3-3 of the UPIA provides, in pertinent part:

§ 3-3. Penalty for failure to file or pay.

\*\*\*

a-10) This subsection (a-10) is applicable to returns due on and after January 1, 2001. A penalty equal to 2% of the tax required to be shown due on a return, up to a maximum amount of \$250, reduced by any tax that is paid on time or by any credit that was properly allowable on the date the return was required to be filed, shall be imposed for failure to file the tax return on or before the due date prescribed for filing determined with regard for any extension of time for filing. **However, if any return is not filed within 30 days after notice of nonfiling mailed by the Department to the last known address of the taxpayer contained in Department records, an additional penalty amount shall be imposed equal to the greater of \$250 or 2% of the tax shown on the return.** However, the additional penalty amount may not exceed \$5,000 and is determined without regard to any part of the tax that is paid on time or by any credit that was properly allowable on the date the return was required to be filed (penalty for late filing or nonfiling). If any unprocessable return is corrected and filed within 30 days after notice by the Department, the late filing or nonfiling penalty shall not

apply. If a penalty for late filing or nonfiling is imposed in addition to a penalty for late payment, the total penalty due shall be the sum of the late filing penalty and the applicable late payment penalty. In the case of any type of tax return required to be filed more frequently than annually, when the failure to file the tax return on or before the date prescribed for filing (including any extensions) is shown to be nonfraudulent and has not occurred in the 2 years immediately preceding the failure to file on the prescribed due date, the penalty imposed by Section 3-3(a-10) shall be abated.

\*\*\*

(i) If a taxpayer has a tax liability that is eligible for amnesty under the Tax Delinquency Amnesty Act and the taxpayer fails to satisfy the tax liability during the amnesty period provided for in that Act, then the penalty imposed by the Department under this Section shall be imposed in an amount that is 200% of the amount that would otherwise be imposed under this Section.

35 ILCS 735/3-3 (a-10), (i) (emphasis added).

Taxpayers argue that they should not be assessed a second tier penalty because they never received the Notice of Proposed Tax Due (NPTD), which the Department offered as Department Ex. 3. Mr. Doe testified that the first time he saw that document was during discovery, after he asked counsel for the Department for a copy of the file in this matter, and a copy of that document was included in the Department's response.

The record includes documentary evidence that tends to corroborate Mr. Doe's claim, and Mr. Doe himself pointed out how that documentary evidence serves to explain why it was that he and his wife did not receive the NPTD. A copy of taxpayers' 2002 filed joint Illinois return was admitted as Department Ex. 4, and bears a date of April 4, 2003. Mr. Doe testified that he and his wife had previously resided at that Aurora address, but that they had moved to Darien, Illinois, approximately three months after they filed their 2002 Illinois return. The NPTD bears a date of August 20, 2003, and lists taxpayers' address as being in Aurora, Illinois.

Thus, under Mr. Doe's version of events, the Department presumably mailed<sup>1</sup> the NPTD to them at their former Aurora address some time after they moved away from that address. This is plausible, considering that

---

<sup>1</sup> I say "presumably mailed" because of the presumption of correctness that attaches to the Department's NOD (35 ILCS 5/904(b)), which includes a second tier penalty that, according to UPIA § 3-3, is properly assessed after the Department mails a notice of nonfiling. 35 ILCS 735/3-3(a-10). There was no direct evidence offered by the Department regarding when or by what means it mailed the NPTD.

there is no evidence of when the Department first compared the information from the IRS with its own history of taxpayers' filings for the same year, and considering that the address listed on taxpayers' 2001 federal return is not the Aurora address to which the NPTD is addressed. In other words, it is logical to conclude that the Department became aware that taxpayers' last known address was in Aurora, Illinois, when taxpayers filed their 2002 return, on or about April 2003, after which the Department presumably mailed the NPTD to taxpayers in August 2003. The NOD in this matter was served to taxpayers at the Darien address on or about June 23, 2004. Again, it is reasonable to assume that the Department ascertained taxpayers' newer address, which was used on the NOD, after they filed their 2003 return, which was due on or before April 15, 2004. In sum, Mr. Doe offered competent and corroborated testimony that explains why taxpayers may not have received the NPTD the Department asserts was mailed to taxpayers on or about August 20, 2003, and his testimony that they did not receive the NPTD is not so incredible as to be beyond belief.

Notwithstanding taxpayers' argument, the question remains whether their receipt of the NPTD matters. The text of UPIA § 3-3(a-10), after all, provides that the second tier penalty "shall be imposed ... if any return is not filed within 30 days after notice of nonfiling mailed by the Department to the last known address of the taxpayer contained in Department records ...." Those words clearly reflect that a second tier penalty will be proper even if it never actually gets to the taxpayer. That clear text, however, must also be read in conjunction with UPIA § 3-8, which just as clearly provides that the "penalties imposed by §§ 3-3, 3-4, and 3-5 shall not apply if the taxpayer shows that its failure to file a return or pay a tax when due was due to reasonable cause. 35 **ILCS** 735/3-8. That section further provides that reasonable cause shall be determined in each situation in accordance with the rules and regulations promulgated by the Department. *Id.* In other words, even though the Illinois General Assembly authorized the Department to propose and/or assess a second tier penalty whenever a taxpayer has failed to timely respond after the Department has issued a notice of nonfiling, it has also clearly authorized the Department to abate such a penalty where the unique circumstances of a particular case warrant.

The Department has promulgated a regulation in which it defined reasonable cause and described how it would administer the UPIA. 86 Ill. Admin. Code § 700.400. That regulation provides, "... whether a taxpayer

acted with reasonable cause shall be made on a case by case basis taking into account all pertinent facts and circumstances. The most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine his proper tax liability and to file and pay his proper liability in a timely fashion.” 86 Ill. Admin. Code § 700.400(b); *see also* PPG Industries, Inc., 328 Ill. App. 3d at 22-23, 765 N.E.2d at 40. The regulation further provides that, “[a] taxpayer will be considered to have made a good faith effort to determine and file and pay his proper tax liability if he exercised ordinary business care and prudence in doing so. A determination of whether a taxpayer exercised ordinary business care and prudence is dependent upon the clarity of the law or its interpretation and the taxpayer’s experience, knowledge, and education. \*\*\*\*” 86 Ill. Admin. Code § 700.400(c).

Here, Mr. Doe offered credible testimony that he and his wife had not received the Department’s NPTD, and that testimony was corroborated by documentary evidence. Thus, the record includes competent and credible evidence that is sufficient to show that taxpayers’ failure to respond to the Department’s NPTD was reasonable, and not done in an attempt to avoid reporting and/or paying their 2001 tax liabilities. I conclude, therefore, that taxpayers have established reasonable cause to abate the second tier penalty proposed in this matter.

**Conclusion:**

I recommend that the Director revise the NOD to eliminate the second tier penalty and the interest associated with that penalty, and that he finalize that NOD as so revised, pursuant to statute.

Date: 9/22/2005

John E. White  
Administrative Law Judge